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In The Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS ADVOCATES, ET AL., IN SUPPORT OF RESPONDENTS

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AMICUS CURIAE BRIEF ON BEHALF OF RESPONDENTS UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

STATEMENT OF INTEREST[1]

Human Rights Advocates, Poverty & Race Research Action Council, The Advocates for Human Rights, the University of Minnesota Human Rights Center, and the US Human Rights Network hereby request that this Court consider the present brief pursuant to Supreme Court Rule 37.2(a) in support of respondents. The interests of *amici* are described in detail in the Appendix.

Amici urge the Court to consider international law, including the United States' treaty obligations, when applying the standards of the United States Constitution. These standards are part of United States law pursuant to the Supremacy Clause, and they provide for the use of "special measures" (the international law term for affirmative action) when needed to attain equality with respect to rights. Also addressed are the law and practice of other countries, which likewise affirm the use of considerations of race in higher education admissions decisions. The international and treaty standards support the University of Texas' argument that their criteria are closely tailored to furthering a

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[1] Letters from all counsel consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No other person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

compelling state interest justifying the use of race as part of their holistic admissions program to meet the strict scrutiny requirement.

SUMMARY OF ARGUMENT

International law and opinion have informed the law of the United States since the adoption of the Declaration of Independence. The Founders were greatly influenced by international legal and social thought, and throughout the history of the United States, courts have referred to international standards when considering the constitutionality of certain practices.

In this case, holistic consideration of race in admissions decisions to universities is consistent with the United States' treaty obligations as well as international practice, which makes it all the more compelling. Indeed, the review bodies for two treaties that the United States is party to have urged the United States to undertake special and remedial measures to eradicate *de facto* discrimination in schools. Other independent international law experts have counseled the United States to do the same. The European Court of Justice and the national courts of other countries have also upheld affirmative action measures in relation to addressing racial disparities in higher education. The international treaties and practice support the University of Texas's approach to admissions and they should be considered when assessing its validity under the Fourteenth Amendment.

ARGUMENT

I.
INTERNATIONAL AND COMPARATIVE FOREIGN LAW ARE RELEVANT TO THE SUPREME COURT'S CONSIDERATION OF THE CONSTITUTIONALITY OF THE UNIVERSITY OF TEXAS' ADMISSIONS PROGRAM

While the constitutionality of the University of Texas's undergraduate admissions program is largely bound up in domestic law and Fourteenth Amendment jurisprudence, examining the permissibility of holistic considerations of race in admissions decisions[2] in the international context would continue the Court's "longstanding practice" of looking at international and foreign law to affirm and inform constitutional interpretation. *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010).

The Declaration of Independence itself speaks to the significance of other nations:

> When in the Course of human events, it becomes necessary for one people to

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[2] This terminology is used interchangeably with "affirmative action," both of which are referenced in the Fifth Circuit decision of *Fisher v. University of Texas at Austin*, 631 F.3d 213, 239, 242 (5th Cir. 2011), and by the University of Texas throughout its brief in that case. Br. for Appellees, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 239, 242 (2011) (No. 09-50822) (2010 WL 2624785). The treaties that the United States is party to refer to this concept as "special measures" and "remedial steps."

> dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a *decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation.

The Declaration of Independence para. 1 (U.S. 1776) (emphasis added).

Thomas Jefferson, drafter of the Declaration of Independence, had a keen appreciation for international opinion and law. He had a broad understanding of eighteenth century political thought, and was greatly influenced by European Enlightenment philosophers and their understanding of ancient Greek democracy and the Roman Republic. *See* Darren Staloff, *Hamilton, Adams, Jefferson: The Politics of Enlightenment and the American Founding* 250-51 (2005). John Adams too understood the need to select the best the world had to offer in order to create a better government, and he believed that international opinion should inform the new nation's laws and institutions. *See* John Adams, *A Defence of the Constitutions of Government of the United States of America*, Preface, (1787), *available at* http://www.constitution.org/jadams/ja1_pre.htm (Da Capo Press Reprint ed., last visited July 30, 2012).

In urging courts to afford the requisite "decent respect to the opinions of mankind" Justice Blackmun explained that:

> [T]he early architects of our Nation understood that the customs of nations–the global opinions of mankind–would be binding upon the newly forged union. John Jay, the first Chief Justice of the United States, observe . . . that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations."

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, (1994) (footnotes omitted). This Court has recognized that history and noted that:

> For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

Sosa v. Alvarez-Machain, 542 U.S. 692, 729-30 (2004) (citations omitted).

In recent decisions, the Court has referred to international standards and has invoked U.S. treaty obligations, particularly when human rights issues arise. *Roper v. Simmons*, 543 U.S. 551, 576-77 (2005) (citing the United Nations Convention on the Rights of the Child as well as other nations' practices in abolishing juvenile death penalty); *see also Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (referencing a decision from the European Court of Human Rights in finding Texas's sodomy law

unconstitutional); Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1, 88 (2006) (describing this Court's cases as demonstrating "a longstanding tradition of relying on international law to inform constitutional meaning"). Thus, the Court recognizes the relevance of international law even when it is not directly binding. The relevance is even stronger in situations where the United States is party to a pertinent treaty.

Members of the Court have invoked international legal obligations in discussions of race-conscious policies in higher education, in particular. *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring). In *Grutter*, the concurrence explained that the Court's decision to uphold the University of Michigan Law School's race-conscious admissions program comported with the United States' obligations under The Convention on the Elimination of All Forms of Racial Discrimination (CERD) to enact 'special and concrete measures' to guarantee equal protection and enjoyment of human rights for all races. *Id.* (citation omitted); *see also* Ruth Bader Ginsburg & Deborah Jones Merritt, *Lecture: Fifty-First Cardozo Memorial Lecture—Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 282 (1999-2000) ("[C]omparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups."). Particularly with respect to the CERD and the International Covenant on Civil

and Political Rights (ICCPR), treaties which the United States has ratified, the United States has assumed international legal obligations that should inform the Court's analysis here.

II.
CONSIDERATIONS OF RACE IN ADMISSIONS DECISIONS ARE CONSISTENT WITH THE UNITED STATES' INTERNATIONAL HUMAN RIGHTS COMMITMENTS

A. Human Rights Treaties Ratified by the United States Require the Adoption of Race-Conscious Measures

The United States has ratified two international human rights treaties that support, and indeed require, the race-conscious measures that are at issue in this case: the CERD and the ICCPR. Under the Supremacy Clause of the Constitution, these treaties are the supreme law of the land, U.S. Const., art. VI, cl. 2, and state and local government share responsibility with the federal government for upholding the United States' human rights treaty commitments. [3] The ratification of these treaties

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[3] In ratifying CERD and the ICCPR, the United States attached an understanding setting forth a division of labor between federal, state and local government for domestic implementation. 140 Cong. Rec. S7634-02 (daily ed. June 24, 1994) (U.S. reservations, declarations, and understandings, CERD); 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) (U.S. reservations, declarations, and understandings, ICCPR). The record notes that the United States would implement the Conventions "to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state

creates binding international legal obligations for the United States to uphold and implement the principles of the CERD and the ICCPR, and it makes the provisions of the treaty the law of the land.[4]

1. Considerations of Race Are Consistent with the CERD

CERD was ratified by the U.S. in 1994, and obligates parties to the treaty "to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations" and to "undertake to prevent, prohibit and eradicate all [racially discriminatory] practices." CERD, Preamble & art. 3, *adopted*, Dec. 21, 1965, S. Treaty Doc. No. 95-18, 660 U.N.T.S. 195.

CERD requires state parties to take affirmative steps to accomplish these goals. Article 1(4) states that:

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and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention." 140 Cong. Rec. S7634-02, at § II.

[4] In considering the treaties for this purpose, this Court need not address the issue of whether the treaty provisions are self-executing or the validity of the "non-self-executing" declarations that accompany some of the treaties. For background and legislative history of the declarations, *see* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. Cin. L. Rev. 423, 456-62 (1996-1997). Courts have applied treaty provisions in defensive postures without considering whether they are self-executing. *See United States v. Rauscher*, 119 U.S. 407, 430 (1886); *United States v. Alvarez-Machain*, 504 U.S. 655, 669-70 (1992), *rev'd on other grounds*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination.

Id. art 1(4). Article 2(2) reiterates this requirement, providing that States shall take "special and concrete measures" to help guarantee full freedom and protection under the law for groups and individuals of all races. *Id.* art. 2(2). These special measures are limited in that they cannot lead to "unequal or separate rights for different racial groups," and are to end after the intended objectives have been achieved. *Id.* art. 2(2); art. 1(4).

The CERD treaty body, the CERD Committee,[5] has explained that special measures

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[5] In ratifying the CERD and ICCPR, the U.S. accepted the obligation to submit to periodic review by the independent experts charged with monitoring treaty compliance ("the treaty bodies"). For CERD, the treaty body is the Committee on the Elimination of Racial Discrimination (CERD Committee). For the ICCPR, the treaty body is the Human Rights Committee. The review process entails the submission of a report by the state concerning the steps it has taken domestically to implement the treaty's provisions. The treaty body reviews this report, and then issues a set of recommendations calling attention to areas of concern with regard to that state's compliance. UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 30, The United Nations Human Rights Treaty*

should include laws, policies, or practices that can affect areas such as housing, education, employment, and general participation in public life. UN Comm. on the Elimination of Racial Discrimination (CERD), *General Recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination* (*Gen. Recommendation No. 32*), U.N. Doc. No. CERD/C/GC/32 24 (Sept. 24, 2009), *available at* http://www.unhcr.org/refworld/docid/4adc30382.html. These laws or policies should be implemented by parties to address the situation of disfavored groups, and should work towards both *de jure* and *de facto* equality for all races. *Id.* ¶ 22. The obligation for parties to "secure human rights and fundamental freedoms on a nondiscriminatory basis" requires that parties address not just intentional discrimination, but also discriminatory effects. *Id.* ¶ 14. Such affirmative or positive actions should be "appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary." *Id.* ¶ 16. The emphasis of the programs adopted as special measures should be to "correct[] present disparities and . . . prevent[] further imbalances from arising." *Id.* ¶ 22.

System: An introduction to the core human rights treaties and the treaty bodies, June 2005, No. 30, at 15, 17-23, *available at* http://www.unhcr.org/refworld/docid/479477490.html. The treaty bodies also issue comments called General Comments or General Recommendations setting forth their definitive interpretation of the various treaty provisions. *Id.* at 29. By their nature, General Comments apply to all states parties.

When reviewing countries' compliance with the convention, the CERD Committee has often raised the importance of special measures, particularly in the field of education. *See, e.g.*, CERD, *Report of the Committee on the Elimination of Racial Discrimination*, 50th Sess., Supp. No. 18, ¶ 394, U.N. Doc. A/50/18 (Sept. 22, 1995), *available at* http://www.unhcr.org/refworld/docid/453779970.html ("The Committee strongly recommends that [Mexico] make an increased effort in promoting affirmative measures in the field of education and training."); CERD, *Report of the Committee on the Elimination of Racial Discrimination*, 52nd Sess., Supp. No. 18, ¶ 94, U.N. Doc. A/52/18 (Sept. 26, 1997), *available at* http://www.unhcr.org/refworld/docid/45c30c767.html (urging Guatemala to increase efforts "to promote affirmative measures in the fields of education and training"). Requests for states to initiate or enhance special measures to promote greater equality in education are common in the CERD Committee's annual reports.

Importantly, the Committee has also made numerous references to concerns about access to higher education in particular, underscoring the recognition that inequalities at the university level are within the purview of the treaty, and that addressing those inequalities is part of the parties' legal obligations. *See, e.g.*, CERD, *Report of the Committee on the Elimination of Racial Discrimination*, 51st Sess., Supp. No. 18, ¶ 503, U.N. Doc. A/51/18 (Sept. 30, 1996) *available at* http://www.unhcr.org/refworld/docid/3f52efba4.html (recommending that Namibia adopt "[a]ffirmative

measures . . . to overcome vestiges of the past that still hamper the possibilities for black people, including vulnerable groups among them, to have access to secondary and higher education . . . ."); CERD, *Report of the Committee on the Elimination of Racial Discrimination*, 71st Sess., ¶ 280, U.N. Doc A/62/18 (Oct. 1, 2007) *available at* http://www.unhcr.org/refworld/docid/473424062.html (urging the Former Yugoslav Republic of Macedonia to "intensify its efforts to reduce the high dropout rate in the secondary and higher levels of education among ethnic Albanian and Turkish children"); *Id.* ¶ 220 ("[Israel] should ensure that access to higher education is ensured for all without discrimination, whether direct or indirect, based on race, colour, descent, or national or ethnic origin.").

The United States' policies on education have been the subject of concern for the CERD Committee, as well. In its report to the Committee in 2007, the U.S. cited "race-conscious educational admission policies and scholarships" as evidence of the country's *compliance* with article 2(2) and specifically mentioned the *Grutter* decision as an example of that compliance. CERD, *Reports submitted by States parties under article 9 of the Convention : International Convention on the Elimination of all Forms of Racial Discrimination : 6th periodic reports of States parties due in 2005 : United States of America* ¶¶ 128, 131, U.N. Doc. CERD/C/USA/6 (Oct. 24, 2007), *available at* http://www.unhcr.org/refworld/docid/4785e8be2.html. Nevertheless, in the Concluding Observations commenting on its review of the United States' report, the Committee responded that the United States had not done

enough to enact special measures to eradicate *de facto* discrimination in schools, recommending that the United States:

> undertake further studies to identify the underlying causes of de facto segregation and racial inequalities in education, with a view to elaborating effective strategies aimed at promoting school desegregation and providing equal educational opportunity in integrated settings for all students. In this regard, the Committee recommends that the State party take all appropriate measures . . . [to allow] school districts to voluntarily promote school integration through the use of carefully tailored special measures adopted in accordance to article 2, paragraph 2, of the Convention.

CERD, *Consideration of reports submitted by States parties under article 9 of the Convention : International Convention on the Elimination of All Forms of Racial Discrimination : concluding observations of the Committee on the Elimination of Racial Discrimination : United States of America* ¶ 17, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008), *available at* http://www.unhcr.org/refworld/docid/4885cfa70.html. Although the Concluding Observations referred specifically to Supreme Court decisions that limit the consideration of individual students' race in K-12 school assignments, it is clear that the CERD Committee is cognizant and concerned about racial equality in American schools

generally, and that it frames the issue in terms that echo "strict scrutiny" standards under the Constitution. This point was highlighted in the most recent review of the United States by the CERD Committee which again expressed concern about state measures adopted against the use of affirmative action in school admissions. CERD: *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, Education, U.N. Doc. CERD/C/USA/CO/7-9 (September 25, 2014, *available at* http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhspzOl9YwTXeABruAM8pBAK1Q%2fDZ6XAqlyobgts1zwlHPkQhsSqMrVxuS6brQbHYpDYGXBUCX1bgRtTg3HaweAr5PBs9soaesD5KdByekI9OS.

The Committee reiterated its previous recommendations that the United States of America adopt and strengthen the use of special measures. *Id.*

Compounded with the numerous recommendations for special measures in higher education throughout CERD's evaluations of other nations, it is clear that parties to CERD, including the United States, are obligated under the treaty to take all necessary measures, including positive action, to end *de facto* segregation—and thus to promote equal opportunity—in all levels of education, as part of the parties' legal obligations.[6]

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[6] For information on demographics on race in the United States related to income, education, and employment, *see* Connie de la Vega, *The Special Measures Mandate of*

Thus holistic considerations of race in higher education admissions decisions are consistent with the United States' international legal obligations under CERD, and indeed can be defended on the grounds that they implement the United States' treaty obligations. Such considerations promote a compelling state interest, and consistent with strict scrutiny analysis, they are closely tailored to that compelling interest.

2. Considerations of Race Are Permissible and Encouraged under The International Covenant on Civil and Political Rights

The United States ratified the ICCPR in 1992. ICCPR, *adopted*, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171. The treaty obligates member states to protect the human dignity of individuals by upholding "equal and inalienable rights" within their territories. *Id.*, Preamble. The Covenant requires states parties to protect individual rights "without distinction of any kind, such as race, colour, sex, language, religion," *Id.* art. 2, and provides that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground . . . ." *Id.* art. 26.

In its 2006 review of U.S. compliance with the ICCPR, the Human Rights Committee (HRC) expressed concern over "de facto racial segregation in

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the International Convention on the Elimination of All Forms of Racial Discrimination: Lessons from the United States and South Africa, 16 ILSA J. Int'l and Comp. L. 627, 644-51 (2010).

public schools," and reminded the U.S. of its obligations under articles 2 and 26 to guarantee effective protection against practices with discriminatory *effects*. The Committee recommended that the U.S. conduct investigation into racial segregation in schools and "take remedial steps." HRC, *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : concluding observations of the Human Rights Committee : United States of America* ¶ 23, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), *available at* http://www.unhcr.org/refworld/docid/45c30bec9.html.

In the United States' report to the Human Rights Committee in 2011 regarding its compliance with its commitments under the ICCPR, the U.S. State Department highlights the Court's consideration of education-specific affirmative action plans and guidance issued by the Departments of Education and Justice to assist educational institutions in pursuing policies to achieve diversity and avoid racial isolation, as evidence of the United States' compliance under ICCPR article 2. HRC, *Fourth Periodic Report of the United States of America to the United Nations Human Rights Committee Concerning the International Covenant on Civil and Political Rights*, ¶ 39, U.N. Doc. CCPR/C/USA/4 (Dec. 30, 2011), *available at* http://www.state.gov/j/drl/rls/179781.htm. In doing so, the government acknowledges, and indeed asserts, that special measures in higher education serve to uphold the "equal and inalienable rights" championed in the ICCPR and further the U.S.'s

compliance with its international obligations under that treaty.

B. Other Independent Human Rights Experts Have Recommended Considerations of Race in Higher Education to Address Inequality

The United Nations Working Group of Experts on People of African Descent [7] has also raised concerns about minority access to higher education in the United States. In a report to the U.N. Human Rights Council concerning its visit to the United States in January 2010, the Working Group found that "the challenges faced by people of African descent in this country related mainly to disproportionately high levels of unemployment, generally lower income levels than the rest of the population, access to education (especially to higher levels of education) and quality of education." Human Rights Council, *Report of the Working Group of experts on people of African Descent: Visit to the United States of America (25 to 29 January 2010)*, Summary, U.N. Doc A/HRC/15/18 (Aug. 6, 2010), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/152/97/PDF/G1015297.pdf?OpenElement. The Working Group suggested that the

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[7] The Working Group is a panel of independent experts established by the UN Commission on Human Rights in 2002 to study and make recommendations and programs to combat issues of racial discrimination, xenophobia, and related intolerance. U.N. Office of the High Commissioner for Human Rights, *Racism, racial discrimination, xenophobia and related intolerance*, CHR Res. 2002/68, U.N. Doc. No. E/CN.4/2002/200 at 287, 290-91 (Apr. 25, 2002), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/152/72/PDF/G0215272.pdf?OpenElement.

United States continue the initiatives already in place to remedy inequality in the education system, and also create "positive action policies to achieve parity of educational conditions among students of African descent and those of the majority population." *Id.* ¶ 83.

C. The University Of Texas' Holistic Race-Conscious Approach To Admissions Is Consistent With International Treaty Obligations And Recommendations

Throughout the proceedings of this case, the University of Texas has argued that it seeks to admit a "critical mass" of minority students to its undergraduate programs through a holistic, individualized admissions process. The University contends that its program, which looks at a combination of factors concerning each applicant, including race, comports with the Supreme Court's decision in *Grutter*, which allows programs that involve a "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 343. This Court agreed that the University's interest in the educational benefits of diversity was a compelling interest but remanded it for further consideration of whether the admissions program was narrowly tailored to meet that interest. *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013). On remand, the Fifth Circuit held that the admission policy which included race as one of seven factors in its holistic admission program met the "exacting scrutiny" and is narrowly tailored to the University's compelling interest of achieving student body

diversity. *Fisher v. University of Texas at Austin, et al.*, 758 F.3d 633, 637 (5th Cir. 2014) (hereinafter *Fisher II*), *cert. granted*, 135 S.Ct. 2888 (U.S. June 29, 2015) (No. 14-981). That the admissions program follows the dictates of international law that applies to the United States can only bolster its permissibility under the Constitution.

Along with adhering to constitutional requirements under the Equal Protection Clause, the University of Texas' admissions program is also permissible as a means to comply with the United States's international treaty obligations, including those of CERD articles 1(4) and 2(2) concerning special measures to eliminate racial discrimination. As explained above, under CERD, special measures must be "goal-directed programmes which have the objective of alleviating and remedying the disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals, protecting them from discrimination." *Gen. Recommendation No. 32*, ¶ 22. These criteria are consistent with Fourteenth Amendment jurisprudence. The University of Texas's program seeks to promote equal opportunity in higher education for students of all races by ensuring a critical mass of under-represented minorities who otherwise would be less likely to be admitted due to the entrenched (and documented) discrimination against minorities in the United States' educational system. The Fifth Circuit found that UT Austin "demonstrated that race-conscious holistic review is necessary to make the Top Ten Percent Plan workable by patching the holes that a mechanical admissions program leaves in its ability to achieve

the right diversity that contributes to its academic mission . . .", *Fisher II* at 657. It is important to note that the University reported that minority enrollment increased after adoption of the plan. *Id.* at 654-55.[8]

Moreover, CERD requires that states implement special and concrete measures, "when the circumstances so warrant," in order to ensure that all racial groups are granted full and equal human rights. CERD, art. 2(2). Thus, CERD does not require a finding of purposeful discrimination, only discriminatory effects. As the Fifth Circuit explained the first time it addressed this case, the admissions program is warranted in light of a low number of minority students attending the University. *Fisher,* 631 F.3d at 223. After conducting studies to assess whether the university was fully obtaining the educational benefits of diversity that result from a critical mass of underrepresented minority students, *Id.* at 225-26, the University implemented a program that would consider race as one of many factors in deciding which applicants to admit. *Id.* at 228. The policy has led to "noticeable results," *Id.* at 226. Of importance to the treaty obligations is the fact that the program has helped to remedy the lack of minorities due to the fact that residential patterns have resulted in a public school system in Texas that is segregated. *Fisher II* at 651-52. Thus, the admissions program complies with CERD's requirements that special measures be "appropriate to the situation to be remedied, be legitimate . . . [and] respect the principles of fairness and

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[8] Surely such evidence validates the close tailoring of the program to the state's compelling interest.

proportionality." *Gen. Recommendation No. 32*, ¶ 16. The treaty standards thus provide additional support for the University's admission program.

Moreover, the University has shown that these special measures are necessary in a democratic society, *Fisher*, 631 F.3d at 226, as achieving a critical mass of racial minorities in higher education will help to 'promote "cross-racial understanding," "break down racial stereotypes," enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, [and] cultivate the next set of national leaders.' *Id.* at 230 (quoting *Fisher v. Univ. of Texas at Austin*, 645 F. Supp. 2d 587, 603 (W.D. Tex. 2009) (quoting *Grutter*, 539 U.S. at 319-20)). These measures are not discriminatory: the CERD Committee has explained that measures that take into account individuals who are in disadvantaged situations, like the measures at issue here, are "not an exception to the principle of non-discrimination but are integral to its meaning and essential to the [CERD] project of eliminating racial discrimination and advancing human dignity and effective equality." *Gen. Recommendation No. 32*, ¶ 20. The University of Texas's admissions program is a necessary component of instituting nondiscrimination in the United States, as required by the CERD.

Finally, although there is no established end date to the University's program, both informal and formal review processes, *Fisher* 631 F.3d at 226, ensure that the policy adheres to CERD's mandate

that special measures be temporary, *Gen. Recommendation No. 32*, ¶ 16.

III.
OTHER JURISDICTIONS AFFIRM THE USE OF RACE-CONSCIOUS APPROACHES TO PROMOTE EQUALITY AND NON-DISCRIMINATION

In addition to furthering the United States' compliance with its international legal obligations, the University of Texas' race-conscious admissions program comports with affirmative action measures permitted in, and endorsed by, other jurisdictions.[9]

The European Court of Justice, for instance, has endorsed "positive action" programs to promote equality between men and women. In two cases, the European Court has upheld German initiatives that give priority to women in promotion decisions in positions where women were underrepresented. *See* Case C-158-97, *Badeck & Others*, 2000 E.C.R. I-1875, [2001] 2 C.M.L.R. 6, 2000 All ER (EC) 289, 2000 WL 281317 (E.C.J. 2000); Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363, 1997 All ER (EC) 865 (E.C.J. 1997) (*available on* Westlaw). The programs under review in *Badeck* and *Marschall* were intended to counteract unequal opportunities for a disadvantaged group, regardless

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[9] As Justice Breyer notes in his recent book, the practices of other countries bound by the same treaty obligations provide valuable guidance to the Court in construing and applying treaties of the United States. *See* Stephen Breyer, The Court and the World: American Law and the New Global Realities 169 (2015).

of the presence of intentional discrimination.[10] The European Court found that the German policies lawfully pursued this legitimate social objective and utilized means that were proportionate in relation to the real needs of the disadvantaged group. *Badeck*, 2000 E.C.R. I-1875, Operative Part.

Along with the European Court of Justice, national courts in other jurisdictions have upheld affirmative action measures, specifically in relation to racial disparities in higher education. Most recently, the Federal Supreme Court of Brazil, that nation's highest court of appeals on constitutional matters, declared a race-conscious policy in student admissions at the University of Brasília (UNB) to be constitutional. S.T.F. ADFP 186, April 26, 2012. Just as the University of Texas program aims to promote diversity in the university setting, the Brazilian court found that UNB's affirmative action program was necessary to "set a plural and diversified academic environment." *STF declared the constitutionality of the quota system at the University of Brasília*, Supremo Tribunal Federal Portal Internacional (Apr. 26, 2012), http://www2.stf.jus.br/portalStfInternacional/cms/destaquesClipping.php?sigla=portalStfDestaque_en_us&idConteudo=207138.

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[10] Similarly, the University of Texas admissions policy, with its 'goal of having a student body that is meritorious and diverse in a variety of educationally relevant ways,' was designed with recognition of the persistent underrepresentation of African-Americans and Hispanics in the student body. *See* Brief for Respondents at *8.

Courts in South Africa have also upheld race-conscious measures in higher education. In one case, an Indian woman who was denied admission to a medical school challenged the school's affirmative action program that was aimed at benefiting historically-disadvantaged African students. *Motala & Another v. Univ. of Natal*, 1995 (3) BCLR 374(D) (Durban Sup. Ct.), 1995 SACLR LEXIS 256, at *16-*17 (S. Afr. Feb. 24, 1995). The court rejected the claim, stating that the experience of African students in the country required specific compensation and thus the program was not discriminatory under the South African constitution. *Id.* at *28.

Other countries permit affirmative action programs as a matter of law. For instance, India's national constitution was amended in 2005 to affirm that the nation would allow affirmative action in higher education: "Nothing in [the constitution's anti-discrimination provisions] shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for [disadvantaged castes and tribes]." India Const. art. 15, cl. 5. Similarly, the Canadian constitution guarantees equal protection under the law, and explains that this guarantee "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 § 15(2), being Schedule B to the Canada Act, 1982, c.11 (U.K.). In addition,

statutes in New Zealand and Australia permit affirmative action measures in those countries. *See* New Zealand Bill of Rights Act 1990, § 19, 1990, S.N.Z. No. 109-Human Rights Act 1993, 1993 S.N.Z. No. 82 §§ 58, 73(1); Racial Discrimination Act 1975, § 8(1) (Austl.). These examples evidence the willingness by other countries that, like the United States, are parties to the CERD and the ICCPR to endorse race-conscious programs.[11] The practice of other nations should inform the Court's consideration here.

CONCLUSION

The University of Texas' race-conscious admissions policy comports with international human rights standards guaranteeing the full freedom from racial discrimination for all and furthers the United States' compliance with its international treaty commitments. Furthermore, the

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[11] For parties to CERD, *see*, U.N.T.C., International Convention on the Elimination of All Forms of Racial Discrimination, Status as of 22-10-2015, Chapter IV Human Rights, No. 2, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-2&chapter=4&lang=en.For parties to the ICCPR, *see* U.N.T.C., International Covenant on Civil and Political Rights, Status as of 23-10-2015, Chapter IV Human Rights, No. 4, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

University of Texas' program comports with the law of other jurisdictions upholding and endorsing race-conscious measures in admissions in higher education. This international context should inform the Court's analysis of the constitutionality of the University of Texas's consideration of race in its admissions process.

Respectfully submitted,

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Poverty & Race Research Action Council
The Advocates for Human Rights
University of Minnesota Human Rights Center
US Human Rights Network

APPENDIX

Human Rights Advocates (HRA) is a California non-profit corporation founded in 1978 with national and international membership. It endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. HRA has Special Consultative Status in the United Nations and has participated in meetings of its human rights bodies for thirty years. HRA has participated as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal laws. Cases it has participated in include: *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Cal. Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

Poverty & Race Research Action Council (PRRAC) is a civil rights policy organization based in Washington, D.C. Founded in 1989 by national civil rights and poverty law organizations, PRRAC's primary mission is to help connect advocates with social scientists working on race and poverty issues, and to promote a research-based advocacy strategy on structural inequality issues. PRRAC's current work is particularly focused on the causes and consequences of housing and school segregation for low income children of color. PRRAC is a founding member of the National Coalition on School Diversity, and an active member of the U.S. Human Rights Network, a broad coalition committed to domestic implementation of international human rights treaties – including the Convention on the

Elimination of All Forms of Racial Discrimination (CERD). As part of this work, PRRAC submitted two coalition "shadow reports" to the U.N. Committee on the Elimination of Racial Discrimination during the Committee's 2008 United States treaty review, and is planning to participate in the CERD Committee's anticipated 2013 review of U.S. treaty compliance.

The Advocates for Human Rights is a non-governmental, non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, today The Advocates for Human Rights engages more than 500 active volunteers annually to document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates regularly monitors human rights conditions in the United States and reports on conditions before the United Nations. The Advocates for Human Rights has a strong interest in ensuring that the United States construe the Constitution in a way that is consistent with international human rights standards for the elimination of all forms of racial discrimination.

University of Minnesota Human Rights Center (HRC) is dedicated to the advancement of the fundamental rights guaranteed by national and international law. The HRC seeks to ensure that all persons receive the full panoply of rights accorded to them by national and international law regardless of nationality or immigrant status. The HRC maintains one of the largest human rights collections

in the United States (http://www.umn.edu/humanrts). In addition, the Co-Director of the HRC served from 1996-2003 as a member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights and thus has expertise in regard to the human rights law applicable in this matter. The HRC has previously submitted *amicus curiae* briefs; for example in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The US Human Rights Network (USHRN) is an organization that works to build and strengthen a people centered human rights movement in the U.S., where leadership is centered on those most directly affected by human rights violations. USHRN works to grow and deepen the engagement of grassroots and national groups in using international and domestic mechanisms to bolster human rights accountability in the United States. It is a network of over 300 members that is working to popularize human rights in communities across the United States in order to secure dignity and justice for all.